IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,

Petitioner,

v.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

PETITIONER'S BRIEF

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OPINIONS BELOW

The District Court did not prepare or publish an opinion. The opinion of the Circuit Court of Appeals and its opinion on petition for rehearing (R. 230, 257) are reported at 160 F. (2d) 800.

JURISDICTION

This Court's jurisdiction is invoked pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and reenacting Section 240(a) of the Judicial Code, 28

U.S.C.A. §347. A petition for certiorari was filed on July 11, 1947, and granted on October 13, 1947.

STATEMENT OF THE CASE

On March 16, 1944, the petitioner, Globe Liquor Company, Inc., the plaintiff below ("Globe"), placed an order for 750 cases of Mariachi Tequila (Gold) at a price of $10.50 per case, C.I.F. Laredo, Texas (Pl. Ex. 1, R. 178, 63). The order was taken by one Gabriel Todes, a liquor salesman representing the respondents ("International"). The order was written in longhand by Mr. Morton Lazarus, Vice President of Globe, as dictated to him by Todes (R. 100). By exchange of letters, the price of $10.50 per case specified in the original order was increased to $10.75 per case (Pl. Exs. 2, 3, R. 179, 65, 66). The letters incorporated by reference the terms of an irrevocable letter of credit which International required Globe to procure in accordance with a form provided by International's salesman (R. 98, Pl. Exs. 2, 3, R. 179, 65, 66).

Globe obtained from the Chase National Bank of the City of New York an irrevocable commercial letter of credit dated March 29, 1944, in favor of International in the amount of $8,062.50, the total purchase price. The letter of credit was detailed in its terms and required that drafts drawn thereunder be accompanied by "Mexican Shippers' Commercial Invoice in triplicate, showing '750 cases of Tequila (Gold color) at $10.75 per case, CIF Laredo, Texas', Consular invoice in duplicate, Insurance certificate, Original bill of lading issued to order of Mexican Shipper blank endorsed evidencing shipment of 750 cases of Tequila to Laredo, Texas." The letter of credit did not specify any particular "Mexican Shipper" and was assignable (Pl. Ex. 4, R. 180, 67). International accepted the letter of credit with minor formal changes on April 1, 1944 (Pl.

Exs. 5, 6, 7, R. 182-184, 80). Although contending that they were merely agents of the Mexican shipper, International has conceded that the identity of the shipper was not disclosed to Globe until May 10, 1944 (R. 135). This was six weeks after the completion of the contract and International's acceptance of the irrevocable letter of credit.

The tequila was shipped to the United States in bond on May 22, 1944 (Def. Ex. 7, R. 195, 170). A draft drawn under the irrevocable letter of credit for the full amount of the purchase price was paid by Globe (R. 92). On July 11, 1944, the shipment was inspected by representatives of the Food and Drug Administration of the Federal Security Agency and detained upon the ground that it was adulterated as containing "a foreign substance dangerous to health—glass particles" (Pl. Exs. 8, 9, R. 185-186, 87). The Chief of the Philadelphia Station of the Food and Drug Administration gave an affidavit stating in detail the procedures followed in the inspection and further stating that the procedures were those customarily followed by the Philadelphia Station under similar circumstances and were adequate to demonstrate that the shipment of Tequila was adulterated in the manner stated (Pl. Ex. 10, R. 187, 90).[1]

Globe's lot of 750 cases of tequila was combined in the same railroad car with another lot of 750 cases of the same product from the same source destined for another of International's customers in Baltimore. That lot was inspected by the United States Food and Drug Administration in Baltimore and was likewise detained upon the ground that it was adulterated with sharp splinters of glass (R. 108,

[1] It was stipulated that the affidavit should be given the same effect as if the witness had appeared and testified. International's objections to the admissibility of the affidavit on other grounds were overruled (R. 89-90).

114-115).[2] The shipment was continuously detained by the United States and Globe never received the merchandise (R. 92).

It was stipulated that the costs and expenses incurred and actually paid by Globe in connection with the shipment amounted to $9,704.25 (R. 93-94). It was further stipulated that Globe made a timely demand upon International for repayment (R. 94).

On January 29, 1945, Globe instituted suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, sitting in Chicago (R. 2). The case was tried before a jury. It was Globe's theory that International had acted as principals in the transaction or as agents of an unidentified principal, and, hence, were liable as principals under Illinois law (R. 2-5, 53, 121, 131-132), while the defendants asserted that they had acted as agents of a disclosed principal or that they had been orally exonerated from liability as agents (R. 12-14, 59, 202, 205-206). Throughout it was assumed by both parties and the court that a warranty existed and that the primary question was whether the liability was that of International or of the shipper in Mexico (R. 59, 136).

At the conclusion of all of the evidence, International filed a written motion for an instructed verdict upon the grounds, *first*, that they were not principals in the transaction but had acted merely as the agents of a disclosed principal in Mexico and *second*, that the evidence that a portion of the shipment of the tequila was adulterated was insufficient to justify Globe's rejection of the entire shipment (R. 202). This motion was denied and Globe's motion for

[2] The facts with respect to the second shipment destined for a customer other than Globe were admitted into evidence over International's objection solely to show that the sampling procedure followed by the United States was fair and adequate (R. 113).

a directed verdict was granted (R. 176, 177). Pursuant to the court's direction, the jury's verdict was returned and received (R. 176-177, 203). Judgment was entered upon the verdict in the stipulated amount (R. 203-204).

International made no motion under Rule 50(b) of the Federal Rules of Civil Procedure to have judgment entered in accordance with their motion for a directed verdict. Their motion for a new trial was denied (R. 209).

International thereupon appealed to the United States Circuit Court of Appeals for the Seventh Circuit. On February 14, 1947, the Circuit Court of Appeals rendered its decision determining that the complaint alleged and that Globe had relied upon an express warranty, that there was no evidence of an express warranty, and that the trial court accordingly had erred not only in directing a verdict for Globe, but in failing to direct a verdict for International. The judgment of the District Court was reversed with instructions to grant International's motion for a directed verdict and enter judgment thereon (R. 230-232).

On April 14, 1947, the Circuit Court of Appeals denied Globe's petition for rehearing with a written opinion (R. 257). The court conceded that if evidence had been admitted which established an implied warranty under the Illinois Uniform Sales Act, even though the complaint had alleged merely an express warranty, the complaint would be considered as amended to conform to such evidence. Under that Act, an implied warranty is established (a) if the goods were bought by description, and (b) if the sellers were dealers in goods of that description. The court further stated that the goods had been sold by description (R. 258). However, with respect to the second essential element of an implied warranty, the court mistakenly stated that the evidence relied upon by Globe to show that International were

dealers had been kept out of the record on Globe's objection, and, hence, that Globe could not claim the benefit of evidence that it had had excluded (R. 258).[3]

As to its authority finally to dispose of the case in the manner in which it did, the Circuit Court of Appeals took the position that Rule 50(b) was not applicable to a case in which the trial court directed a verdict, and stated that this Court's decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947) should not affect that ruling (R. 260).

Globe immediately moved for leave to file its second petition for rehearing (R. 261) for the purpose of showing that the evidence which the Circuit Court of Appeals had refused to consider was in fact admitted into evidence and included in the record and therefore should serve as the basis for treating the complaint as amended under Rule 15(b). International also filed a motion for a modification of so much of the language in the court's opinion upon rehearing as stated that no part of the deposition of Todes (which contained the evidence relied upon by Globe to establish that International were dealers) was ever read or considered as read in evidence (R. 262-263, 266). By their respective motions, both Globe and International asserted that the court had misread the record. The Circuit Court of Appeals (by Judge Minton acting alone) denied both motions (R. 267).

Globe next filed its motion, pursuant to Rule 75(h) of the Federal Rules, to remit the record to the trial court for the purpose of having the trial judge certify whether the evi-

[3] The evidence relied upon by Globe to show that International were dealers was the testimony of International's witness and salesman, Todes, to the effect that he had "made quite a number of sales" of the tequila for International and that he had "sold thousands of cases of the tequila" (R. 20-21).

dence in question had in fact been admitted. The court (Judge Minton again acting alone) also denied this motion (R: 268-271).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In refusing to consider testimony admitted into evidence and a part of the record on appeal, and, upon a consideration of such testimony, in failing to affirm the judgment of the District Court.

2. If the record is ambiguous as to the admission into evidence of the testimony in question, in refusing to remit the record to the District Judge, pursuant to Rule 75(h), for his certificate as to whether the testimony had in fact been admitted.

3. In remanding the proceedings with instructions to grant International's motion for a directed verdict and to enter judgment thereon, in the absence of a motion by International pursuant to Rule 50(b), for judgment in accordance with their motion for a directed verdict.

4. In remanding with instructions to the District Court to grant International's motion for a directed verdict and enter judgment thereon upon grounds not specified in International's motion for a directed verdict as required by Rule 50(a).

5. In remanding with instructions to the District Court to grant International's motion for a directed verdict and enter judgment thereon, since, under the circumstances, this disposition of the case was arbitrary, capricious and constituted an abuse of discretion.

SUMMARY OF ARGUMENT

I.

The Circuit Court of Appeals refused to treat the complaint as amended pursuant to Rule 15(b) of the Federal Rules to allege an implied warranty on the erroneous ground that testimony establishing one of the essential elements of such a warranty had not been admitted into evidence. The record clearly discloses the contrary to be the case. Even if, however, the record were ambiguous with respect to the District Court's rulings (which it is not) the Circuit Court of Appeals erred in refusing to remit the record to the District Court, pursuant to Rule 75(h), for the purpose of obtaining the certificate of the District Judge as to whether or not the testimony relied upon had been admitted into evidence.

II.

A. The Circuit Court of Appeals erred in reversing the judgment of the trial court. The evidence admitted into the record conclusively established the existence of an agreement for the sale of the tequila to Globe, the buyer, by International, either as principals or as agents of an unidentified principal; the existence of an implied warranty of merchantable quality; the breach by International of the implied warranty; and the damages suffered by Globe. There is no conflicting evidence or evidence sufficient to support a verdict in favor of International.

B. The trial court properly excluded certain evidence offered on behalf of International.

(1) The trial court properly excluded, as violative of the parol evidence rule, evidence offered by International for the purpose of showing either that International were agents or that they were exonerated from liability. The parol evidence rule is a rule of substantive law and the law of Illinois controls.

(2) The trial court properly excluded evidence offered by International showing that the identity of International's alleged principal in Mexico was made known to Globe subsequent to Globe's incurring liability or becoming firmly bound. Under Illinois law, such a disclosure came too late to relieve International of their liability as agents of an unidentified principal.

(3) In the Circuit Court of Appeals, International asserted for the first time that the evidence offered to establish an oral agreement exonerating them from liability as agents also established a valid disclaimer of warranty. The evidence was properly excluded by the District Court as violative of the parol evidence rule. In any event, however, the offered evidence was insufficient as a matter of law to establish the express agreement required by Section 71 of the Illinois Uniform Sales Act to negative an implied warranty.

III.

International having made no post-verdict motion for judgment in accordance with its motion for a directed verdict, pursuant to Rule 50(b), the Circuit Court of Appeals was without power to remand with instructions that the District Court grant International's motion for a directed verdict and enter judgment thereon. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947). This case is precisely like the *Cone* case except that here the jury returned its verdict at the direction of the District Court rather than as its own independent action. This factual distinction does not warrant a different result.

A. The express language of Rule 50(b), and its purpose as announced in the *Cone* case, made clear that the requirement of a post-verdict motion for judgment is applicable in all jury cases.

B. The Circuit Court of Appeals, however, held that the sole purpose of Rule 50(b) was to avoid the constitutional

difficulties considered in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), and that since these difficulties did not exist in directed verdict cases, the Rule was inapplicable in such cases. This view fails to recognize that the avoidance of constitutional difficulties was but one of the Rule's two purposes. Moreover, it is historically inaccurate. This Court, in *Slocum*, made clear that it viewed those constitutional issues as being present in directed verdict as well as independent verdict cases.

IV.

The Circuit Court of Appeals rested its judgment that International's motion for a directed verdict should be granted, and that Globe's petition for rehearing should be denied upon grounds not specified in International's motion. This is contrary to the express command of Rule 50(a) and to the policy of Rule 50 as a whole which require the grounds in support of a motion for a directed verdict to be fully displayed in order to give both the trial court and the other party full and repeated opportunity for their mature consideration and correction if necessary.

Moreover, in applying Rule 50 in such a manner, the Circuit Court of Appeals revived substantial questions that were intended to be put at rest forever by the Federal Rules. *Slocum* v. *New York Life Insurance Co.*, *supra*; *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654 (1935). The first sentence of Rule 50(b) reserves for later determination only the legal questions specified in the motion for a directed verdict. Since the decision of the Circuit Court of Appeals was predicated upon grounds not specified in International's motion for a directed verdict, and hence not reserved for later determination; it follows that the decision of the Circuit Court of Appeals is in direct conflict with the principles of *Slocum*.

V.

Even assuming *arguendo* that the Circuit Court of Appeals was correct in concluding that the testimony relied upon had not been admitted into evidence, it was plainly available and at hand. Moreover, the alleged deficiency in the proof had not been raised by International at any time in the trial stage of the proceedings. Under such circumstances, and wholly apart from the Court's power, it was arbitrary, capricious and an abuse of discretion for the Circuit Court of Appeals to reverse with instructions finally to terminate the litigation, rather than to remand for a new trial.

ARGUMENT

I.

The refusal of the Circuit Court of Appeals to consider testimony admitted into evidence, and its consequent failure to treat the complaint as amended to conform to that evidence, constitute prejudicial error.

In its original opinion, the Circuit Court of Appeals reversed the judgment of the District Court upon the ground that the complaint alleged, but the plaintiff had failed to prove, an express warranty (R. 231). On denial of the petition for rehearing, the court held that where evidence had been admitted which proved a case different from that alleged in the complaint, the pleadings may be treated as amended to conform to that evidence pursuant to Rule 15(b).[5] However, the court refused to treat the complaint

[5] Rule 15(b) of the Federal Rules of Civil Procedure provides in part as follows:

> "(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

as amended to allege an implied warranty on the erroneous ground that testimony establishing one of the essential elements of such a warranty (that the defendants were dealers) had not been admitted into evidence (R. 257-258).[6]

The evidence in question was contained in the deposition of Gabriel Todes, a salesman employed by the defendants, and is as follows (R. 20-21):

"Q. When did you first start selling merchandise as salesman for International Industries?

A. In January, 1944.

Q. You made some sales, did you?

A. I made quite a number of sales.

Q. What commodity did you sell?

A. I sold Tequila.

Q. Mexican Tequila?

A. Mexican Tequila.

Q. What other commodity?

A. Gin. That came from Argentine, and some of it came from Mexico. I sold thousands of cases of the Tequila." (Underscoring supplied)

During the trial, this deposition, which had been taken in behalf of International, was duly opened in open court (R. 143) and was presented to the trial judge out of the

[6] In International's brief in opposition to the petition for writ of certiorari, they concede "for the purpose of considering this petition for certiorari" that the testimony relied upon by Globe was introduced in evidence (Br. p. 25). Uncertainty as to the intended scope of respondents' concession, a recollection that respondents' counsel refused to join in advising the Circuit Court of Appeals that it had erred, and the importance of the issue all combine to require a full presentation of the matter here.

presence of the jury for the purpose of obtaining his rulings on Globe's objections to certain portions thereof.[7] In the course of presenting the deposition to the trial court, certain of Globe's objections were sustained and certain others were overruled. The record shows that the first objection made by Globe was to a question appearing on page 6 of the deposition. The first question objected to by Globe's attorney was as follows:

> "Q. What were his oral instructions to you relative to the taking of orders or selling of merchandise in his behalf?" (R. 144)

An examination of the deposition shows that the evidence relied upon by Globe and quoted above immediately preceded the question to which Globe's first objection was made (R. 21).

At the conclusion of the trial, International's counsel noticed that he had inadvertently failed to make a formal offer into evidence of those portions of the deposition to which objections had not been sustained. He then sought and obtained the consent of Globe's counsel and the ruling of the trial court to the effect that such portions would be considered as though they had been introduced into evidence. The record discloses that the following transpired (R. 177):

> "By Mr. Kahn: I just called Mr. Heineman's attention that I assume from our comment as we went along on the Todes deposition that what went out will stay out, it will simply be offered as an offer of proof, and the few fragments that were left in will be considered as introduced in the record. I did not take the time or the trouble to read those in.

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[7] It is appropriate here to explain the organization of the printed record. The deposition was filed with the Clerk in advance of trial and is set out in its entirety in the record at pages 19-49, as filed at that time. The proceedings in open court with respect to the deposition appear at pages 143-160.

By the Court: They were not introduced.

By Mr. Kahn: I know they were not and that is why Mr. Heineman is now consenting to let me put them in.

By Mr. Heineman: He inadvertently omitted it and I am reluctant frankly to take advantage of an omission by counsel which I know is inadvertent.

By the Court: You are agreeing that those fragments to which objections were not sustained may go in?

By Mr. Heineman: I am agreeing that they may go in.

By the Court: That only had to do with the direct testimony.

By Mr. Heineman: That is correct.

By the Court: Very well" (R. 177-178).

It was in the face of this that the Circuit Court of Appeals stated that "No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted" (R. 258).[8]

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[8] The clarity of the record quoted above with respect to the admission of the evidence relied upon by the plaintiff strongly suggests that the court failed to read that portion of the record, although it was twice expressly brought to its attention (R. 243-244, 261). However, even assuming that the record is ambiguous as to the scope of the trial court's ruling on the admission of the evidence relied upon, the Circuit Court of Appeals erred in denying plaintiff's motion under Rule 75(h) of the Federal Rules, for the remission of the record to the District Court for the purpose of having the trial judge certify whether or not the testimony had in fact been admitted into evidence (R. 268-71). If the record can be said to be susceptible to a legitimate difference of opinion, the resolution of that difference is peculiarly a matter within the province of the trial judge. Rule 75(h) was designed for such a situation. It provides in part as follows:

> "(h). *Power of Court to Correct Record.* It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

If ambiguous, the refusal to remit the record to the District Court conflicts with the decision and practice of the Circuit Court of Appeals for the Eighth Circuit as announced in *Beck* v. *Federal Land Bank of Houston*, 146 F. (2d) 623 (C.C.A. 8th, 1945) and probably with that of the Court of Appeals for the District of Columbia. *Cf. Reynolds* v. *Imlay*, 118 F. (2d) 53 (App. D. C. 1941).

Even counsel for the defendants was quick to suggest to the Circuit Court of Appeals that it had erred in so concluding (R. 262, 266). The defendants pointed out to the court that certain portions of the deposition upon which *they* relied had in fact been admitted into evidence, but denied the admission of the first six pages of the deposition (R. 19-21) upon which the plaintiff relied. Defendants requested the Circuit Court of Appeals to modify its conclusion that no part of the deposition had been admitted (R. 262-264, 266). Defendants' position is patently inconsistent. Although they urge that certain later portions of the deposition were admitted pursuant to the agreement of counsel, they deny without basis that the first six pages of the deposition were admitted, although these pages contain such basic information as the witness' name, address, occupation and relationship to the defendants.

The agreement between counsel and the ruling thereon by the District Court make clear that all portions of the deposition to which objections were not sustained were admitted into evidence. No objection was made or sustained to the evidence relied upon by plaintiff. This testimony was accordingly admitted in evidence and was available to the Circuit Court of Appeals for its consideration.

It follows that the complaint should be treated as amended to conform to that evidence so as to allege the existence of an implied warranty pursuant to Section 15(2) of the Illinois Uniform Sales Act. We think a reading of the opinion of the Circuit Court of Appeals on rehearing requires the conclusion that it would have so treated the complaint had it felt free to consider the evidence (R. 258).

II.

All of the essential elements of liability being established without contradiction by the record evidence, and there being no prejudicial error in the trial court's exclusionary rulings, the judgment of the District Court should be affirmed.

The Circuit Court of Appeals reached no conclusion on the merits. The petition for certiorari preserved the question of whether or not the judgment of the District Court should be affirmed, and accordingly, the merits of the litigation are properly before this Court for determination (Petition for Certiorari, pp. 7-8).

The evidence admitted into the record established as a matter of law the existence of a written integrated contract for the sale of the tequila between Globe, as buyer, and International, as principals and sellers; the existence of an implied warranty of merchantable quality; its breach by International; and the damages sustained by Globe. With respect to the defenses asserted by International, no evidence sufficient to sustain a verdict in its favor was received. The exclusionary rulings of the District Court were required by the substantive law of Illinois. Each of these questions will be discussed separately.

A. The record evidence established as a matter of law the essential elements of International's liability to Globe.

Globe agreed to buy and International agreed to sell to Globe, 750 cases of Mariachi Tequila Gold at a price of $10.75 per case. The contract consisted of a written order given to Todes, International's salesman, and an exchange of confirming letters between Globe and Todes which incorporated by reference the terms of an irrevocable letter of credit which Globe caused to be issued to International at their request and in the terms required by them (Pl. Exs. 1-4, R. 178-181, 63-67, 98).

Section 15(2) of the Illinois Uniform Sales Act creates an implied warranty of merchantable quality (a) if the goods are bought by description and (b) if the sellers are dealers in goods of that description.[9] The goods were bought not by inspection or sample, but by description as Mariachi Tequila (Gold) (Pl. Exs. 1-4, R. 178-181, 63-67). This constitutes a purchase by description within the meaning of the Illinois Uniform Sales Act and the Circuit Court of Appeals so held (R. 258).

The defendants argued in the Circuit Court of Appeals that a purchase by trade name does not constitute such a purchase by description as to give rise to the implied warranty of Section 15(2). This view is contrary to the uniform settled construction of that section of the Uniform Sales Act. A leading case is *Ryan* v. *Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931) where the Court of Appeals, speaking through Cardozo, C. J., held the implied warranty of Section 15(2) to apply to the purchase of "Ward's Bread." See also *Annotation*, 135 A. L. R. 1393 (1941); 55 *Corpus Juris (Sales)* §724, p. 759.

International also argued below that if the purchase is under a trade name, then Section 15(4) of the Uniform Sales Act prohibits the raising of the implied warranty under Section 15(2). Here again the construction of these provisions of the Uniform Sales Act to the contrary is

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[9] Section 15(2) of the Illinois Uniform Sales Act (Ill. Rev. Stats. (1947) c. 121½, §15(2)) provides as follows:

> "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality."

The parties and the Circuit Court of Appeals agreed that the law of Illinois is applicable (R. 258).

settled and uniform.[10] *Giant Mfg. Co.* v. *Yates-American Mach. Co.*, 111 F. (2d) 360, 365 (C.C.A. 8th 1940); *D'Onofrio v. First National Stores, Inc.*, 68 R. I. 144, 26 A (2d) 758 (1942); *Botti* v. *Venice Grocery Co.*, 309 Mass. 450, 35 N. E. (2d) 491 (1941); *Sperry Flour Co.* v. *DeMoss*, 141 Ore. 440, 18 P. (2d) 242 (1933); *Kelvinator Sales Corp. v. Quabbin Improvement Co., Inc.*, 254 N. Y. S. 123, 125 (App. Div. 1931); *Dow Drug Co.* v. *Nieman*, 57 Ohio App. 190, 13 N. E. (2d) 130 (1936).

In the Circuit Court of Appeals, International relied upon two Illinois cases, *Beckett* v. *F. W. Woolworth Co.*, 376 Ill. 470 (1941), and *Santa Rosa-Vallejo Tanning Company* v. *Kronauer & Company*, 228 Ill. App. 236 (1923), as showing that in Illinois, at least, a purchase under a trade name negatives the warranty of merchantable quality implied by Section 15(2). The *Beckett* case involved only an alleged express warranty which the court found did not exist. The court also stated that the sale was by a trade name and that, hence, Section 15(4) applied, but did not rule or indicate whether that fact precluded the application of Section 15(2). The question was neither raised nor argued by the plaintiff.

The *Santa Rosa-Vallejo* case is also plainly distinguishable. The court made clear that the only warranty involved was that of fitness for a special purpose; hence, whatever it said with respect to the effect of Section 15(4) upon the

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[10] Section 15(4) of the Illinois Uniform Sales Act is as follows:

"(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

The implied warranty of "fitness for any particular purpose" is raised by Section 15(1) of the Sales Act. This is entirely different from, and Section 15(4) has no application to, the implied warranty of merchantable quality raised by Section 15(2) and the cases cited in the text so hold.

implied warranty of merchantable quality created by Section 15(2) is dictum and in no way controlling upon the federal courts.[11]

We conclude, therefore, that the Illinois courts have not passed upon the question of whether a sale under a trade name is a sale by description within the meaning of Section 15(2). When the question is presented, the Illinois courts will be required by Section 74 of the Illinois Uniform Sales Act to follow the settled construction given to the Act by the courts of other states. Ill. Rev. Stats. (1947) c. 121½, §74; *The Sherer-Gillett Company* v. *Long*, 318 Ill. 432 (1925). The Circuit Court of Appeals was, therefore, plainly right in holding that the tequila was sold to Globe by description within the meaning of Section 15(2).

Also, the testimony introduced by the defendants unmistakably establishes that they were in fact dealers in tequila within the meaning of Section 15(2). This testimony was that of International's salesman, Todes. It showed that he "made quite a number of sales" of tequila for the defendants, and that he "sold thousands of cases of the tequila." The fact that the evidence also showed that Todes had been acting as International's salesman for several months prior to making the sale to Globe is additional proof of the

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[11] Even if the *Santa Rosa-Vallejo* case be regarded as passing upon this question, *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938) does not require that it be followed by the federal courts. Under the then prevailing Illinois statute, decisions of the Illinois Appellate Court had no "binding authority in any cause or proceeding other than in that in which they may be filed." Smith-Hurd Ill. Ann. Stats., c. 37, §41 (1935). Under identical circumstances, this Court in *Graham* v. *White-Phillips Co., Inc.*, 296 U. S. 27 (1935), held that by virtue of this statute, a decision of the Illinois Appellate Court construing the Illinois Negotiable Instruments Law was not binding upon the federal courts even though they were required to follow the local law.

defendants' status as dealers.[12] The court's opinion on petition for rehearing strongly suggests that had the court felt free to consider the evidence, it would have regarded the implied warranty to have been established as a matter of law (R. 258). In any event, that is the only proper conclusion, since no other or contradictory evidence was offered or admitted.

The record is equally conclusive with respect to the breach of the implied warranty. Due to the intervention of the United States Government, the tequila was never received by Globe. The defendants argued that the proof of adulteration was insufficient to warrant Globe's rejection of the entire shipment. The sample selected by the Food and Drug Administration showed approximately 10 percent of the shipment to be adulterated with glass particles (Pl. Exs. 8, 9, 10, R. 185-189, 87, 90). Moreover, a sample taken by a different station of the Food and Drug Administration from another shipment of the same tequila in the same car and from the same source but destined for a different customer showed approximately 15 percent of the shipment to be adulterated in the same manner (R. 108, 115). In view of the fact that the merchandise was a beverage which Globe was purchasing for resale, the District Court properly determined as a matter of law that the presence of glass particles in that proportion rendered the entire shipment unmerchantable and not the merchandise for which the plaintiff had contracted. It was accordingly held that the breach of warranty was so material as to entitle the plaintiff to sue for the entire purchase price.

For reasons to be discussed hereafter, the District Court excluded the bulk of the evidence offered by International

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[12] All of the above testimony is included in the evidence that the Circuit Court of Appeals improperly refused to consider (R. 258). We have heretofore shown that this testimony was in fact admitted into evidence. *Supra*, pp. 11-15.

to support the defenses urged in their amended answer. Defendants do rely, however, on certain testimony of their salesman, Todes, which was admitted into evidence and which purports to show that Lazarus, Globe's Vice-President, after the breach and while making a demand for the return of the purchase price, made the following statement to Todes:

> "I agree that the shipper is responsible for it. We want our money back. I am not saying that it is your fault but it is the shipper's fault." (R. 154, 32)

This is not an action in tort for negligence, but an action for breach of contract. There is no issue of fact in this case as to whether the defendants were responsible for the presence of glass particles in the bottles. It is conceded that the merchandise was shipped directly from Mexico and that the adulteration was not due to defendants' fault. But the issue is the defendants' liability under Illinois law, either as principals or as agents of an unidentified principal, for the breach of warranty. This testimony leaves that liability unaffected.

The record being devoid of evidence sufficient to support a verdict in favor of International, the Court was under a duty to instruct a verdict for Globe. *Pennsylvania R. R. Co.* v. *Chamberlain,* 228 U. S. 329, 343 (1933).

B. The District Court properly excluded certain evidence offered on behalf of the defendants.

The written contract between the parties was complete and unambiguous and made no disclosure either of the alleged fact that International were agents, or of the identity of their alleged principal. The defendants sought to introduce evidence at the trial seeking in the main to show, *first,* that prior to the making of the contract, their salesman had advised Globe that International were brokers

and not responsible for the shipment, and *second*, that the identity of the Mexican shipper and alleged principal was disclosed or communicated to Globe in apt time. These two general classes of evidence were properly excluded by the District Court for the reasons of substantive Illinois law hereafter to be considered.

(1) Evidence seeking to vary or contradict the terms of the contract between the plaintiff and defendants was properly excluded as violative of the parol evidence rule. The parol evidence rule is a rule of substantive law and the law of Illinois controls.

It is unchallenged that the parol evidence rule is a rule of substantive law and that the law of Illinois controls. *American Crystal Sugar Co.* v. *Nicholas*, 124 F. (2d) 477 (C.C.A. 10th, 1941); *Zell* v. *American Seating Co.*, 138 F. (2d) 641 (C.C.A. 2nd, 1943), *revd. on other grounds*, 322 U. S. 709 (1944); 9 *Wigmore, Evidence*, (3rd Ed. 1940) §2400; 3 *Beale, Conflict of Laws* (1935) §599.1; *Annotation*, 141 A. L. R. 1043 (1942).

At the trial the defendants offered the deposition of Gabriel Todes, their salesman, for the purpose of showing that the plaintiff had been orally advised at the time of the placing of the order that the defendants were brokers and not responsible for the shipment (R. 26). In anticipation of that offer, the District Court heard extended argument and discussion of the cases on parol evidence. Thereupon, the court ruled that the major portion of the testimony contained in the deposition was inadmissible in that it sought to vary or contradict the terms of a written contract (R. 143, 120-160).[13] The Circuit Court of Appeals erred in concluding that "no written definitive contract was

[13] Since this testimony was excluded, Globe did not offer any rebuttal evidence.

entered into by the parties covering the transaction" (R. 231).[14]

The contract between the parties consisted of the order and an exchange of letters which incorporated the terms of the irrevocable letter of credit by express reference thereto. The initial order called for a 60 day letter of credit (Pl. Ex. 1, R. 178, 63). This order was dictated by defendants' salesman (R. 100). The letter of March 24, 1944, from defendants' salesman to Globe directed Globe to "execute your letter of credit exactly in accordance with the form which I left you" with certain minor changes (Pl. Ex. 2, R. 179, 65). The confirming letter from Globe to defendants' salesman stated that "we have put through the letter of credit in accordance with the specimen you left here, but I changed to Tequila where you had the word Vodka" (Pl. Ex. 3, R. 179, 66). The terms of the irrevocable letter of credit so incorporated and made a part of the agreement were precise, unambiguous and detailed (Pl. Ex. 4, R. 180, 67).

The controlling Illinois authorities make clear that the District Court was correct in concluding that the written documents constituted a written contract not subject to variation or contradiction by parol evidence. *The Telluride Power Transmission Company* v. *The Crane Company*, 208 Ill. 219, 226 (1904); *Hypes* v. *Griffin*, 89 Ill. 134 (1878). In this last decision, the court cited with approval and quoted from *Nash* v. *Towne*, 5 Wall. 689 (1866), as follows:

> "Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed."

[14] The grounds upon which the Circuit Court of Appeals actually disposed of the case were not based in any way upon this conclusion.

There are no Illinois decisions to the contrary. The District Court's exclusion of this evidence was proper.

(2) The District Court properly excluded evidence offered by the defendants to show that the identity of the alleged principal was made known to Globe subsequent to its incurring liability or becoming firmly bound upon its contract.

Even if the District Court misapplied the parol evidence rule, the error was a harmless one. The admission into evidence of testimony allegedly establishing that the defendants were in fact agents would not have been sufficient to relieve them of liability upon the contract or to sustain a verdict in their favor.

The law is settled in Illinois as elsewhere that in the case of a partially disclosed principal, that is, where the fact of agency is known but the identity of the principal is unknown, the agent is liable as a principal upon his contracts with third persons. *Annes* v. *Carolan, Graham, Hoffman, Inc.*, 336 Ill. 542 (1929); *Wheeler* v. *Reed*, 36 Ill. 81, 91 (1864); *Scaling* v. *Knollin*, 94 Ill. App. 443 (1900); *American Appraisal Co.* v. *Pio*, 246 Ill. App. 467 (1927); *Trench* v. *Hardin County Canning Co.*, 67 Ill. App. 269 (1896), *aff'd.* 168 Ill. 135 (1897). The Illinois law, which is binding upon the federal courts in this case, reflects the well-considered views of the majority of the other courts. 2 *Restatement, Agency* (1933) §321, p. 712; 2 *Corpus Juris (Agency)*, §491, pp. 816, 817.

It is equally well established that the agent is not relieved of liability by the disclosure of the principal's identity subsequent to the third person's incurring liability or becoming bound upon his contract. The principle is well

stated in *Tiffany on Agency* (1924 Ed.), §99, where it is said (at page 73):

> "Thus the third person may successfully maintain suit against the agent of an undisclosed principal, and this right is not lost or diminished by a discovery of the existence or of the identity of the principal after the contract was made." (footnotes omitted).

3 *C.J.S. (Agency)* §216, states the rule as follows (at page 125):

> "A disclosure of the fact of agency and the identity of the principal made before or at the time the contract is entered into or before liabilities are incurred is sufficient to relieve the agent from personal liability. It is then that the disclosure to the other party must be made for a subsequent discovery or disclosure of the principal is ineffective to relieve the agent from liability." (footnotes omitted).

The order, exchange of letters and letter of credit constituting the agreement between the parties bore dates from March 16 to March 29, 1944 (Pl. Exs. 1-4, R. 178-181, 63-67). At the trial, International's counsel conceded that May 10, 1944, was the first date upon which the name of Gonzalo A. Larrea, the Mexican shipper and alleged principal, was disclosed to Globe (R. 135, Amended Answer, R. 12-13). It was also conceded that the identity of the alleged principal was withheld intentionally and for what the defendants believed to be sound commercial purposes.[16] The Dis-

[16] In his opening statement to the jury, counsel for International said:

> "Although at the time Mr. Todes did not state the name of the shipper, the reason is obvious. Because the demand for liquor was so strong in behalf of purchasers that had they known the name of the shipper, and his name and location they could have dealt directly with the shipper, and in that way would obviate and deprive my clients from the small commission they were to earn." (R. 55)

It is well settled that admissions by counsel in his opening statement are binding evidence of the facts admitted. *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 263 (1880); *Best* v. *District of Columbia*, 291 U. S. 411, 415 (1934).

trict Court properly excluded all evidence offered by the defendants to show the disclosure of the identity of their alleged principal since the evidence showed on its face that under Illinois law the disclosure came too late to affect the defendants' liability.[17]

At various times in the course of these proceedings, the defendants have relied upon the excluded testimony of Todes (R. 26) as establishing an express agreement either exonerating them from liability as agents or negativing the implied warranty.[18] As we have said, we believe that the trial court correctly determined that the testimony was inadmissible by virtue of the parol evidence rule.

In any event, however, the testimony could not possibly establish either of the two defenses now raised by the defendants.

The authorities make clear that in the case of an unidentified principal, there is a strong natural presumption against the existence of an agreement exonerating the agent from liability so as to leave the buyer with recourse only against an unknown principal. The authorities establish that such an agreement will not be inferred but that it must be mutually intended and that the third party's assent thereto must be clearly manifested. The comment of Section 321 of the *Restatement* is in part as follows:

> "The inference of an understanding that the agent is a party to the contract exists unless the agent gives

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[17] This evidence consisted of defendants' exhibits 4, 5, 6, 8, 9, and 10 (R. 192-198, 168-171).

[18] There is, of course, a substantial difference between these two defenses. If the defendants were merely exonerated from liability as agents, the alleged principal would, nevertheless, remain liable for breach of the implied warranty, whereas if the implied warranty were negatived, the buyer would have no recourse against anyone.

> such complete information concerning his principal's identity that he can be readily distinguished. If the other party has no reasonable means of ascertaining the principal, the inference is almost irresistible and prevails in the absence of an express agreement to the contrary." 2 *Restatement, Agency*, (1933) § 321, p. 712.

See also 1 *Williston, Contracts*, (Rev. Ed. 1936) § 285, where the following appears:

> "There can be no policy of the law forbidding a person who deals with an agent assenting to such a bargain, foolish though it may be, if he wishes to do so. But in the absence of clear expression to the contrary, it is a fair presumption that he does not wish to do so, and the law is clear that the mere fact that the agency, but not the principal, is disclosed will not free an agent from personal liability as a contractor."

Under detailed examination by defendants' counsel, Todes made clear that Globe's Vice-President said nothing when allegedly advised that the defendants would not be responsible.[19] Silence does not manifest the clear intention to enter into a foolish bargain which would warrant submitting that issue to a jury. Under analogous circumstances, the Supreme Court of Illinois has held that a contract between

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[19] The testimony of Mr. Todes is as follows (R. 48):

> "Q. During this March 16th, 1944 conversation with Mr. Lazarus, when you told him the International Industries would not be responsible for the shipment of the merchandise or the quality of the merchandise, what, if anything, did he say?
>
> A. Nothing.
>
> Q. He didn't object to that statement on your part?
>
> A. No.
>
> Q. He had no comment?
>
> A. I understand—
>
> Q. You can not give us your understanding. You can only state what you heard and what was said.
>
> A. All right.
>
> Q. Was there any comment about it all?
>
> A. No comment."

two parties can not be based upon a statement of one party which is met by silence on the part of the other. *Bladell* v. *Carroll*, 336 Ill. 168, 171 (1929). *Cf. 1 Restatement, Contracts* (1932) §72, p. 77; 1 *Williston, Contracts* (Rev. Ed. 1936) §91, p. 279.

Nor is this silence sufficient to establish an agreement negativing the implied warranty. Section 71 of the Illinois Uniform Sales Act requires an "express" agreement to negative an implied warranty (Ill. Rev. Stats. (1947), c. 121½ §71).[20] Moreover, this so-called disclaimer of warranty was never raised by International in the trial court. International's amended answer, motion for an instructed verdict, motion for a new trial and statement of points relied upon for reversal were all silent as to the existence of any such defense (R. 12, 202, 204, 211).

The record evidence establishes without contradiction each of the essential elements of International's liability to Globe. There is no record evidence of any defense sufficient to sustain a verdict in favor of International. The District Court's exclusionary rulings were correct, or even if incorrect, harmless error. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

III.

The Circuit Court of Appeals was without power to remand with directions to grant International's motion for a directed verdict and to enter judgment thereon.

The Circuit Court of Appeals reversed the judgment of the District Court in favor of Globe and directed the District Court to grant International's motion for a directed

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[20] Section 71 is as follows:

"§71. Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

verdict and to enter judgment thereon. International had made no post-verdict motion pursuant to Rule 50(b) for judgment in accordance with their motion for a directed verdict.

In *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947), this Court made clear that a party's failure to make such a post-verdict motion constituted an insuperable barrier to the entry by the Circuit Court of Appeals of a final judgment for the party losing below. The case is precisely like the *Cone* case except that here the jury returned its verdict at the direction of the District Court rather than as its own independent act. Although this may constitute a distinction in fact, it does not warrant a different result in view of the express language of Rule 50(b) and its purpose as announced in the *Cone* case and in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940).

Rule 50(b) is as follows:

> "(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested ver-

> dict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Rule 50(b) deals uniformly with motions for directed verdicts and their consequences under all possible circumstances. Its language permits of no exceptions. With respect to its requirement of a post-verdict motion for judgment, it draws no distinction between whether the jury returned the verdict as its independent act, whether it returned the verdict at the direction of the trial court, or indeed, whether it failed to return any verdict at all. The Rule divides the possibilities into two categories: either a verdict was received, or it was not returned and the jury was discharged.

We take it that there is no question but that a directed verdict is one returned and received within the meaning of Rule 50(b) as fully as though it had been the independent act of the jury. This accords not only with what was actually done here (R. 177, 203-204), but with what has always been the view of a directed verdict. Thus, in *Hodges* v. *Easton*, 106 U. S. 408 (1882), the Court, speaking through Mr. Justice Harlan, said (at 412):

> "Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court."

The terms "reception" and "return" of a verdict are words of art. It must be assumed that Rule 50(b) gives them their accepted meaning by applying them without distinction to all classes of verdicts. Had a departure from the

accepted meaning of these terms been intended by Rule 50(b), it would not have been accomplished *sub silentio*.

Even if the fact that the verdict was directed may suggest that it was not returned or received within the meaning of Rule 50(b), the post-verdict motion for judgment would still be required since this case must then be regarded as falling within the other category established by the Rule; that is, that the jury was discharged without returning a verdict. This seems to us, however, to be contrary not only to the record facts which disclose that the verdict was returned and received, but contrary to the historical conception of directed verdicts.[21]

The conclusion that Rule 50(b) applies equally to directed verdict cases is confirmed by its underlying policy. This Court in the *Cone* case made clear that it was the purpose of Rule 50(b) to provide a litigant with the opportunity to receive the trial court's peculiarly informed judgment as to whether the proceedings should be finally terminated or a new trial or nonsuit granted. We are wholly unable to see why Globe here, merely because it had a verdict directed in its favor, is less entitled to that opportunity than a litigant who has received a verdict as the independent act of the jury, or who has received no verdict at all due to the failure of the jury to agree.

The opinion in the *Cone* case might have been written with the facts of this case in mind. Here the Circuit Court of Appeals reversed and finally terminated the litigation by

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[21] This suggests the existence of quite another defect in the judgment of the Circuit Court of Appeals. It is not clear to us how the Circuit Court of Appeals can instruct a District Court to direct a verdict where the jury has already been discharged. *Hodges* v. *Easton*, 106 U. S. 408 (1882). *Cf. Barney* v. *Schmeider*, 9 Wall. 248 (1869). This paradox underscores the requirement of Rule 50(b) for a post-verdict motion for judgment in order to provide the foundation for the final disposition of the proceedings on appeal.

directing that judgment be entered for the defendants upon the ground that the plaintiff had alleged an express warranty but had failed to prove it. The court then denied rehearing upon the ground that evidence establishing an implied warranty was not a part of the record. Even assuming the Circuit Court of Appeals to have been correct in its view of the record, the *Cone* case compels the conclusion that the District Court should at least have been provided with the opportunity to determine what disposition should have been made of these proceedings. In the *Cone* case this Court said (330 U. S. at 217):

> "There are other practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payment of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit.
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> • • •
>
> "In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion." (footnote omitted)

It is inconceivable that the trial court would not have permitted Globe to "fill the crucial gap in the evidence" if it had been brought to the court's attention at the trial stage

of the proceedings, particularly since the allegedly missing proof was available and at hand.

Nor is it permissible to say that a verdict having been directed against International, it would have been a meaningless ritual for them to have moved for judgment in accordance with their motion for a directed verdict. It is undoubtedly true that denying the defendants' motion for an instructed verdict and directing a verdict for the plaintiff discloses a greater degree of conviction on the part of the trial court than denying the defendants' motion for an instructed verdict and submitting the issues to the jury for its independent judgment. It by no means follows that the trial court should thereby be conclusively presumed to be unwilling to correct the error if provided with the "opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone" (330 U. S. at 216).

The Circuit Court of Appeals approached the question from the wrong end of the stick. What it regarded as controlling was the submission of the issues to the jury for their independent consideration, whereas what the *Cone* case treats as controlling is the preservation to the trial judge of a subsequent and more leisurely opportunity both to determine whether he had erred, and if he had, to determine in his initial discretion whether the entry of judgment, the granting of a new trial or the permitting of a voluntary nonsuit would provide the most appropriate vehicle for the correction of that error. So viewed, it is clear that in interpreting Rule 50(b) and in distinguishing the *Cone* case, the Circuit Court of Appeals was guided by immaterial criteria not to be found in the Rule. The effect of its action is to rewrite Rule 50(b) so as to carve out an exception for directed verdict cases where none exists.

To hold Rule 50(b) to be without application where plaintiff's motion for a directed verdict is granted and the defendant's motion denied, would be ludicrous from still another point of view. The defendants would either have no means of obtaining judgment in the trial court despite error in directing the verdict for the plaintiff, or the time and manner of moving for judgment in this one class of cases would be unregulated by the Federal Rules. The possibility of any such anomalous result has never been suggested either by the Advisory Committee or any of the commentators upon the Federal Rules.

In reaching this result, the Circuit Court of Appeals stressed the Rule's purpose of avoiding the constitutional difficulties of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913). Believing that these constitutional difficulties arose only where the issues were submitted without reservation to the jury for its independent action, the court concluded that Rule 50(b) was intended to deal only with this latter situation and not with a directed verdict case. No authority was relied upon.

There are two complete answers to the court's position. *First*, Rule 50(b) has not one, but two functions. As was pointed out in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940):

> "Rule 50(b) merely renders unnecessary a request for reservation of the question of law or a formal reservation; and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct."

Even were the court correct in its limited view of the constitutional questions that the first sentence of Rule 50(b) was intended to solve, it does not follow that the Rule's second function, to regulate the time and manner of moving

for judgment because of the failure to direct, has no applicability to directed verdict cases. That it is in fact applicable to directed verdict cases has been amply demonstrated above.

Second, the limited view taken by the Circuit Court of Appeals of the constitutional problems that Rule 50(b) was intended to settle is historically inaccurate. In *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), the Court held it to be a reexamination of the facts contrary to the Seventh Amendment for the Circuit Court of Appeals to direct the entry of judgment notwithstanding the verdict where the issues had been submitted to the jury without reservation of the legal question raised by the motion for directed verdict.[22] Throughout its opinion the Court made clear that insofar as the constitutional objections were concerned, there was no difference between a case in which the verdict was returned by the jury as its independent act and a case in which the verdict was returned at the direction of the court. In neither could judgment be ordered for the other party. A new trial was required. Contrasting demurrers to the evidence with motions for directed verdicts, the Court said (at 395):

> "And when a judgment on a demurrer to the evidence is reversed because given for the wrong party, the error is corrected by ordering a judgment for the other party, whereas when a judgment is reversed for error in granting or refusing a request to direct a verdict, judgment is not ordered for either party, but a new trial is awarded. This was so at common law, and it has been the uniform course of action in this court from the beginning."

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[22] The holding of *Slocum* was recently reaffirmed in *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937).

After discussing certain earlier decisions, the Court said (at 387-388):

> "In principle, these cases are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment, and this, we have seen, consists of the court and jury, unless there be a waiver of the latter."

And again (at 398):

> "Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to have them tried to the court and a jury, and this is as true of a second trial as of the first. Whether the evidence is sufficient to sustain a verdict for one party or the other is quite another matter and does not affect the mode of trial, but only the duty of the court in instructing the jury and of the latter in giving their verdict. The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed and whether it be ample or meagre. To speak, therefore, of the evidence as determinative of the right to a trial by jury is to confuse the test of that right with a different test applicable only in

determining whether a particular verdict should be directed."

A contemporary commentator also saw the *Slocum* case as applying equally to directed verdicts. *Schofield, New Trials and the Seventh Amendment*, 8 Ill. L. Rev. 287, 288-289 (1913).

In *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654 (1935) this Court approved the final disposition of the proceedings by a Circuit Court of Appeals where the legal questions raised by the motion for a directed verdict had been expressly reserved by the trial court, pointing out that this procedure was well-established at common law (at 659). The practice of reserving the legal questions in order to permit the final disposition of the proceedings without a new trial was followed not only in independent verdict cases, but also in directed verdict cases.[23] Indeed, in *Redman* the Court relied upon directed verdict and nonsuit cases to illustrate the very practice that it was approving, 295 U. S. at 659-660, fn. 5.

It is agreed that the first sentence of Rule 50(b) was intended to obviate the constitutional objections announced in *Slocum* by making automatic the reservation procedure approved in *Redman*. As we have shown, the same constitutional objections were raised by *Slocum* with respect to directed verdict cases and the reservation procedure approved in *Redman* had theretofore been required to be followed in directed verdict cases as well, unless a new trial were to be the only remedy. It follows that the Circuit Court of Appeals erred in concluding that the first sentence of Rule 50(b) does not apply to directed verdict cases. To hold as did the Circuit Court of Appeals is

[23] See *e.g. Baylis* v. *Travelers' Insurance Company*, 113 U. S. 316 (1885); *Suydam* v. *Williamson*, 20 How. 427 (1857).

equivalent to holding that Rule 50(b) settled only half of the constitutional questions raised by *Slocum*. This seems to us to be inconceivable.

It is, of course, unnecessary for us to argue that in a directed verdict case in which the legal questions were not reserved, the Seventh Amendment inevitably requires a new trial for error in refusing to direct a verdict. It is sufficient to say that in the light of *Slocum* and prior decisions, such an outcome was a definite possibility. The first sentence of Rule 50(b) was intended to eliminate any such possibility without the necessity for adjudication.

Moreover, our view is fortified by the broad sweep of the language of the first sentence of Rule 50(b):

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted. . . ."

The language is unqualified and applies to any case in which a motion for a directed verdict has been denied or for any reason not granted. It is of no importance in bringing the Rule into play that the other party's motion may have been granted.

If, on the other hand, this Court were to conclude, as did the Circuit Court of Appeals, that Rule 50(b) is without application to this situation, then the constitutional problem is squarely presented since, apart from Rule 50(b), the legal questions raised by International's motion for a directed verdict were not reserved for a later determination.

IV.

The Circuit Court of Appeals was without power to direct the District Court to grant International's motion for a directed verdict upon grounds not specified in the motion.

There is no doubt but that the Circuit Court of Appeals rested its judgment instructing the District Court to grant

the defendants' motion for a directed verdict upon grounds not specified in that motion. The Circuit Court of Appeals relied solely and expressly upon the ground that the complaint had alleged, and Globe had relied upon, an express warranty as to which there was a total failure of proof (R. 231). On denial of the petition for rehearing the Circuit Court of Appeals determined (contrary to the fact) that the proof relied upon by Globe as establishing an implied warranty was not in the record (R. 258). Neither of these grounds had been specified or intimated in the defendants' motion for a directed verdict, which the Circuit Court of Appeals directed the District Court to grant (R. 202). As a matter of fact, the third ground of the defendants' motion for a directed verdict assumed the existence of a warranty and argued merely that the evidence was insufficient to establish such a breach as would entitle the plaintiff to reject the entire shipment (R. 202).

Rule 50(a) requires that a motion for a directed verdict shall "state the specific grounds therefor."[24] Rule 50(b) provides that if such a motion be not granted, the action is submitted to the jury subject to the later determination of the "legal questions raised by the motion", and authorizes a motion to have "judgment entered in accordance with [the party's] motion for a directed verdict." The Rule, therefore, discloses a coherent scheme to require the grounds for a motion for a directed verdict to be fully dis-

[24] Rule 50(a) is as follows:

"(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

played, and to give both the trial court and the other party a full and repeated opportunity for mature consideration of those grounds in order that timely correction could be made if necessary. The Circuit Court of Appeals read the Rule as though the quoted language were omitted. It determined that the District Court had erred in doing what it was never asked to do.

The effect of the decision is to authorize appeals based upon errors lurking in the record which might have been corrected either by the parties or the trial court had they been appropriately raised. This Court pointed out in the *Cone* case that the motion under Rule 50(b) for judgment in accordance with the motion for a directed verdict afforded the trial judge a last chance to correct his errors. This becomes a futile last chance indeed if a party need not specify his grounds in his motion for a directed verdict.

As the notes of the Advisory Committee on Rules for Civil Procedure show, the requirement of Rule 50(a) that a motion for a directed verdict shall state the specific grounds therefor was intentionally adopted for the purpose of resolving a conflict between the Circuit Courts of Appeals over the correct Federal practice. And under Rule 50, other Circuit Courts of Appeals have consistently assumed that the motion for a directed verdict must specify its grounds before those grounds will be noticed upon appeal. *Virginia-Carolina Tie & Wood Co.* v. *Dunbar*, 106 F. (2d) 383 (C.C.A. 4th, 1939); *Atlantic Greyhound Corporation* v. *McDonald*, 125 F. (2d) 849 (C.C.A. 4th, 1942); *Ryan Distributing Corp.* v. *Caley*, 147 F. (2d) 138 (C.C.A. 3rd, 1945) *cert. den.* 325 U. S. 859 (1945).

Moreover, in applying Rule 50 as it did, the Circuit Court of Appeals revived the constitutional question raised in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), and that were intended to be put at rest forever by the Federal Rules. *Supra*, pp. 35-38.

Only legal questions raised by the motion for a directed verdict are reserved by Rule 50(b) for later determination. Under Rule 50(a) a motion for a directed verdict raises only the legal questions specified. It follows, therefore, that since the decision of the Circuit Court of Appeals was based on grounds not specified in International's motion for a directed verdict, it was based on legal questions not reserved for later determination by Rule 50. Hence, unless that action be held prohibited by Rule 50, there is squarely raised the substantial constitutional question heretofore discussed.

V.

In any event, the direction by the Circuit Court of Appeals that the proceedings be finally terminated was arbitrary, capricious and an abuse of discretion.

Wholly apart from the question of its power, the action of the Circuit Court of Appeals in finally terminating the litigation without giving Globe an opportunity to remedy the alleged deficiency in the proof was arbitrary, capricious and an abuse of discretion. Whether or not the Todes testimony was admitted into evidence, the record on appeal clearly disclosed its existence and availability. With it, there was plainly a meritorious cause of action. The arbitrariness of the court's action is underscored by the fact that the alleged defect was never raised by International below, and, accordingly, neither the trial court nor Globe was ever provided with an opportunity to remedy it.

This litigation did not take place in the time of Lord Coke. The action of the Circuit Court of Appeals does not conform to modern conceptions of litigation as a means to the peaceful determination of substantial rights, rather than as a sporting event.

We submit that it was an abuse of discretion for the Circuit Court of Appeals not to remand for a new trial.

Conclusion

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed. Even were this Court to conclude to the contrary, so much of the judgment of the Circuit Court of Appeals as directs the District Court to grant International's motion for a directed verdict and to enter judgment thereon should be reversed and these proceedings should be remanded to the Circuit Court of Appeals with instructions to remand to the District Court for a new trial.

Respectfully submitted.

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